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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In The Matter of

American Communications Services, Inc.

Petition for Expedited Declaratory Ruling  
Preempting Arkansas Public Service  
Commission Pursuant to Section 252(e)(5)  
of the Communications Act of 1934,  
as amended

CC Docket No. 97-100

COMMENTS OF THE  
TELECOMMUNICATIONS RESELLERS ASSOCIATION  
ON PETITION OF  
AMERICAN COMMUNICATIONS SERVICES, INC.  
FOR EXPEDITED DECLARATORY RULING

TELECOMMUNICATIONS  
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## **SUMMARY**

The Telecommunications Resellers Association, a trade association representing more than 500 entities engaged in, or providing products and services in support of, telecommunications resale, hereby respectfully urges the Commission to issue a declaratory ruling preempting Sections 9(d) through (j) of the Arkansas Telecommunications Regulatory Reform Act of 1997 to the extent that they constrain the Arkansas Public Service Commission from performing the pro-competitive functions assigned to it by the Telecommunications Act of 1996 and Sections 5(b) and (d) of the Arkansas Act to the extent that they unduly prefer incumbent local exchange carriers. TRA agrees with American Communications Services, Inc. that, if permitted to stand, the identified portions of Sections 5 and 9 of the Arkansas Act will have the effect of hindering the entry, as well as the competitive viability, of competing providers of local exchange/exchange access services within the State of Arkansas and will otherwise thwart or impede critical Federal telecommunications policies embodied in the 1996 Act and the Commission's implementing rules and regulations.

While the Arkansas General Assembly declared its intention in enacting the Arkansas Act to "[p]rovide for a system of regulation of telecommunications services consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms . . . ," the Arkansas Act simply cannot be read in harmony with the pro-competitive policies embodied in the telephony portions of the 1996 Act and the Commission's implementing rules and regulations. Even a cursory reading of the Arkansas Act reveals that the sympathies of the Arkansas General

Assembly lie so transparently with incumbent providers of local telecommunications services that some of the most basic precepts of the 1996 Act have been placed in jeopardy in the State of Arkansas. Apparently, the Arkansas legislature independently determined that it would be inherently inequitable to require incumbent LECs to facilitate the market entry efforts of potential competitors and that, accordingly, the appropriate legislative course was to cap the associated obligations of incumbent LECs at the absolute minimum network interconnection/access and resale requirements imposed by the 1996 Act.

The finger prints of incumbent LECs are all over the Arkansas Act. As such, the Arkansas Act is just one more manifestation of a legislative/judicial/regulatory campaign on the part of the incumbent LECs to thwart or delay local exchange/exchange access competition. Decisive action is required by the Commission to derail the incumbent LEC legislative/judicial/regulatory juggernaut.

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The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, and Public Notice, DA 97-652, released April 3, 1997, hereby submits its comments in support of the Petition for Expedited Declaratory Ruling filed by American Communications Services, Inc. ("ACSI") in the above-captioned matter. TRA joins with ACSI in urging the Commission to preempt, or otherwise enjoin the enforcement of, Sections 5(b) and (d) and 9(d) through (j) of the Arkansas Telecommunications Regulatory Reform Act of 1997 (the "Arkansas Act"). TRA agrees with ACSI that, if permitted to stand, the identified portions of Sections 5 and 9 of the Arkansas Act will have the effect of hindering the entry, as well as the competitive viability, of competing providers of local exchange/exchange access services within the State of Arkansas and

will otherwise thwart or impede critical Federal telecommunications policies embodied in the 1996 Act and the Commission's implementing rules and regulations.

## **I.**

### **STATEMENT OF INTEREST**

A national trade association, TRA represents more than 500 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. Although initially engaged almost exclusively in the provision of domestic interexchange telecommunications services, TRA's resale carrier members have aggressively entered new markets and are now actively reselling international, wireless, enhanced and internet services.<sup>1</sup> TRA's resale carrier members also are or will be among the many new market entrants that will soon be offering local exchange telecommunications services, generally through traditional "total service" resale of incumbent local exchange carrier ("LEC") or competitive LEC retail service offerings or by recombining unbundled network elements obtained from incumbent LECs, often with their own switching facilities, to create "virtual local exchange networks."

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<sup>1</sup> TRA's resale carrier members serve generally small to mid-sized commercial, as well as residential, customers, providing such entities and individuals with access to rates generally available only to much larger users. TRA's resale carrier members also offer small to mid-sized commercial customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users. And TRA's resale carrier members are at the forefront of industry efforts to diversify and expand service and product offerings, endeavoring in so doing to satisfy in a convenient and cost-effective manner all of the telecommunications needs of both residential and commercial consumers.

Not yet a decade old, TRA's resale carrier members -- the bulk of whom are small to mid-sized, albeit high-growth, companies<sup>2</sup> -- nonetheless collectively serve millions of residential and commercial customers and generate annual revenues in the billions of dollars.<sup>3</sup> The emergence and dramatic growth of the resale industry over the past five to ten years has produced thousands of new jobs and myriad new commercial opportunities. In addition, TRA's resale carrier members have facilitated the growth and development of second- and third-tier facilities-based interexchange carriers ("IXCs") by providing an extended, indirect marketing arm for their services, thereby further promoting economic growth and development. And perhaps most critically, by providing cost-effective, high quality telecommunications services to the small business community, TRA's resale carrier members have helped other small and mid-sized companies expand their businesses and generate new employment opportunities.<sup>4</sup>

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<sup>2</sup> The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of \$10 million and employs in the neighborhood of 50 people. Among TRA's resale carrier members, roughly 30 percent have been in business for less than three years and over 80 percent were founded within the last decade. And while the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 25 percent of TRA's resale carrier members generate revenues of \$5 million or less a year and less than 20 percent have reached the \$50 million threshold. Seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have work forces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers.

<sup>3</sup> TRA's resale carriers are also well represented among the ten, and constitute more than half of the twenty, largest interexchange carriers in the Nation.

<sup>4</sup> President Clinton could have been referring to TRA's resale carrier members when he noted in The State of Small Business: A Report of the President 1994 (at page 7), "a great deal of our Nation's economic activity comes from the record number of entrepreneurs living the American Dream. . . . I firmly believe that we need to keep looking to our citizens and small businesses for innovative solutions. They have shown they have the ingenuity and creative power to make our economy grow; we just need to let them do it."

TRA's resale carrier members are generally national service providers, offering interexchange and other telecommunications services throughout the United States, including the State of Arkansas. Many of the TRA resale carrier members that provide long distance service to residential and business customers located in the State of Arkansas have sought, or will soon seek, to expand their service offerings within the State to include local exchange/exchange access services. TRA's resale carrier members hence are among the many potential competitors whose market entry and competitive provision of local exchange/exchange access service will be hindered by the Arkansas Act. Indeed, among new market entrants, TRA's resale carrier members, as small and mid-sized providers, are likely to be the most seriously disadvantaged by preferential treatment of incumbent local exchange carriers (LECs") and imposition of barriers to competitive entry.

## **II.**

### **ARGUMENT**

#### **A. The Commission's Preemptive Authority Under the Telecommunications Act of 1996**

Designed to "provide for a procompetitive, deregulatory national policy framework, the Telecommunications Act of 1996 was enacted to, among other things, "open[] all telecommunications markets to competition."<sup>5</sup> To facilitate achievement of this end, the 1996

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<sup>5</sup> Joint Managers' Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement").



Act "fundamentally change[d] telecommunications regulation."<sup>6</sup> Among other things, "[t]he 1996 Act . . . recast the relationship between the FCC and state commissions responsible for regulating telecommunications services."<sup>7</sup> "The 1996 Act move[d] beyond the distinction between interstate and intrastate matters that was established in the 1934 Act, and instead expand[ed] the applicability of national rules to historically intrastate issues, and state rules to historically interstate issues."<sup>8</sup>

In fulfilling its statutory obligation to "establish regulations to implement the requirements of [section 251],"<sup>9</sup> the Commission concluded "that some national rules are necessary to promote Congress' goals for a national policy framework and serve the public interest."<sup>10</sup> Consistent with this view, the Commission "adopt[ed] national rules where they facilitate administration of sections 251 and 252, expedite negotiations and arbitrations by narrowing the potential range of dispute where appropriate to do so, offer uniform interpretations of the law that might not otherwise emerge until after years of litigation, remedy significant imbalances in bargaining power, and establish the minimum requirements necessary to implement the nationwide competition that Congress sought to establish."<sup>11</sup> Of particular importance to

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<sup>6</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325, ¶ 1 (released August 8, 1996), *pet. for rev. pending sub nom. Iowa Utilities Board v. FCC*, Case No. 96-3321 (8th Cir. Sept. 5, 1996), *recon.* FCC 96-394 (Sept. 27, 1996), *further recon.* FCC 96-476 (Dec. 13, 1996), *further recon. pending* ("Local Competition First Report and Order").

<sup>7</sup> Id. at ¶ 2.

<sup>8</sup> Id. at ¶ 24.

<sup>9</sup> 47 U.S.C. § 251(d)(1).

<sup>10</sup> Local Competition First Report and Order, FCC 96-325 at ¶ 41; *see id.* at ¶ 113.

<sup>11</sup> Id. at ¶ 41; *see id.* at ¶¶ 113 - 114.

TRA's resale carrier members, the Commission emphasized that "national rules will assist smaller carriers that seek to provide competitive local service," noting that "national rules [would] greatly reduce the need for small carriers to expend their limited resources securing their right to interconnection, services, and network elements to which they are entitled under the 1996 Act, . . . reduce delay and lower transaction costs, which impose particular hardships for small entities that are likely to have less of a financial cushion than larger entities, . . . [and] create economies of scale for entry into multiple markets."<sup>12</sup>

The Commission further declared that "the regulations the Commission establish[ed] pursuant to section 251 are binding upon states and carriers and section 2(b) does not limit the Commission's authority to establish regulations governing intrastate matters pursuant to section 251."<sup>13</sup> The Commission explained that "the local competition provisions of the 1996 Act are directed to both intrastate and interstate matters," noting that "[a] statute designed to develop a *national* policy framework to promote local competition cannot reasonably be read to reduce significantly the FCC's traditional jurisdiction over interstate matters by delegating enforcement responsibilities to the states, unless Congress intended also to implement its national policies by enhancing [the Commission's] authority to encompass rulemaking authority over intrastate interconnection matters."<sup>14</sup> Moreover, the Commission continued, "[i]n enacting sections 251 and 252 after section 2(b), and squarely addressing therein the issue of interstate and intrastate jurisdiction, . . . Congress intended for sections 251 and 252 to take precedence over

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<sup>12</sup> *Id.* at ¶ 61 (footnotes omitted).

<sup>13</sup> *Id.* at ¶ 84.

<sup>14</sup> *Id.* at ¶¶ 87 - 88.

any contrary implications based on section 2(b)."<sup>15</sup> And, given the statutory mandate to implement the local competition provisions of the 1996 Act and the "expansive" powers afforded the Commission to do so, the Commission held that its rulemaking authority under Sections 251 and 252 is not "limited to those instances where Commission action regarding intrastate matters is specifically mandated."<sup>16</sup>

Certainly, the Commission has authority -- indeed, the obligation -- under Section 253 of the Communications Act to preempt any State or local statute, regulation or legal requirement that prohibits, or may have the effect of prohibiting, "the ability of any entity to provide any interstate or intrastate telecommunications service."<sup>17</sup> In fact, Section 253 affirmatively prohibits any such statute, regulation or legal requirement.<sup>18</sup> Consistent with its title, the legislative history of Section 253 confirms that this provision was "intended to remove all barriers to entry in the provision of telecommunications services."<sup>19</sup> The Conference Report's reference to "all barriers to entry," particularly when read in conjunction with Section 253's prohibition of any State or local statute, regulation or legal requirement that may have the effect of prohibiting competitive entry, confirms that Section 253 bars not just legal, but economic, technical and other operational, barriers to entry. As the Commission has recognized:

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<sup>15</sup> Id. at ¶ 93; Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082, ¶¶ 1, 23 (1996), *pet. for rev. docketed* City of Bogue, Kansas and City of Hill City, Kansas v. FCC, Case No. 96-1432 (D.C.Cir. filed Nov. 22, 1996).

<sup>16</sup> Local Competition First Report and Order, FCC 96-325 at ¶ 96.

<sup>17</sup> 47 U.S.C. § 253.

<sup>18</sup> Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082 at ¶ 23.

<sup>19</sup> Joint Explanatory Statement at 126.

Vigorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs. . . . The elimination of ['operational barriers to competition, such as access to rights of way, collocation, and the expeditious provisioning of resale and unbundled network elements to new entrants'] is essential if there is to be a fair opportunity to compete in the local exchange and exchange access markets.<sup>20</sup>

Moreover, it is well settled that even within the dual regulatory system that had prevailed under the Communications Act, the Commission had the authority to preempt state statutory or regulatory actions which would have the effect of thwarting or impeding federal regulatory goals, provided that such regulatory action was "narrowly tailored to preempt only such state [actions] as would negate valid FCC regulatory goals."<sup>21</sup> Under the new regulatory regime established by the 1996 Act, the Commission would be acting within the scope of its delegated authority in preempting State actions which are inconsistent with Sections 251 and 252 and the implementing rules promulgated by the Commission thereunder.<sup>22</sup>

**B. The Arkansas Act and the Incumbent LECs' Efforts to Thwart or Delay the Advent of Local Exchange/Exchange Access Competition**

Even a cursory reading of the Arkansas Act reveals that the sympathies of the Arkansas General Assembly lie so transparently with incumbent providers of local telecommunications services that some of the most basic precepts of the 1996 Act have been

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<sup>20</sup> Local Competition First Report and Order, FCC 96-325 at ¶¶ 16, 18.

<sup>21</sup> California v. FCC, 39 F.3d 919, 933 (9th Cir. 1990) (*quoting* California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990); Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153 (1982)..

<sup>22</sup> Louisiana Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 369 (1986); New England Public Communications Council Petition for Preemption Pursuant to Section 253, CCBPol 96-11, FCC 96-470, ¶ 26 (December 10, 1996), *recon.* FCC 97-143 (April 18, 1997).

placed in jeopardy in the State of Arkansas. Apparently, the Arkansas legislature independently determined that it would be inherently inequitable to require incumbent LECs to facilitate the market entry efforts of potential competitors and that, accordingly, the appropriate legislative course was to cap the associated obligations of incumbent LECs at the absolute minimum network interconnection/access and resale requirements imposed by the 1996 Act. Nowhere is this desire to insulate incumbent LECs from competition to the maximum extent possible more evident than in the language of Section 9(d) of the Arkansas Act which mandates that:

Except to the extent required by the Federal Act and this Act, the Commission shall not require an incumbent local exchange carrier to negotiate resale of its retail telecommunications services, to provide interconnection or to sell unbundled network elements to a competing local exchange carrier *for the purpose of allowing such competing carrier to compete with the incumbent local exchange carrier in the provision of basic local exchange service.*

While the Arkansas General Assembly declared its intention in enacting the Arkansas Act to "[p]rovide for a system of regulation of telecommunications services consistent with the Federal Act, that assists in implementing the national policy of opening the telecommunications market to competition on fair and equal terms . . . ," the Arkansas Act simply cannot be read in harmony with the pro-competitive policies embodied in the telephony portions of the 1996 Act and the Commission's implementing rules and regulations. As ACSI correctly notes, the 1996 Act envisioned a critical role for the Arkansas Public Service Commission ("Arkansas PSC") and other State Commissions in facilitating the emergence of local exchange/exchange access competition. As succinctly described by the Commission:

We conclude that states and the FCC can craft a working relationship that is built on mutual commitment to local service competition throughout the country, in which the FCC establishes uniform, national rules for some issues, the states and the FCC administer these rules, and the states adopt other critically important rules to promote competition.<sup>23</sup>

As the Commission repeatedly made clear, the rules it was adopting were "minimum requirements;" it was up to the States to "impose additional pro-competitive requirements."<sup>24</sup> Indeed, the Commission expressly declined to adopt a "'preferred outcomes' approach," reasoning that it was for the States to "take into account local concerns."<sup>25</sup> Moreover, the 1996 Act reserved to the States a host of critical functions such as approving negotiated, and arbitrating disputed, network access/interconnection arrangements and setting rates for network interconnection and access to unbundled network elements, as well as establishing wholesale discounts.<sup>26</sup>

As ACSI points out, Section 9 of the Arkansas Act deprives the Arkansas PSC of the flexibility to perform these pro-competitive functions. Under Section 9, the Arkansas PSC cannot undertake to do more than the bare minimum required by the 1996 Act and the Commission's implementing rules and regulations, and sometimes is precluded from even going this far. For example, the Arkansas PSC cannot expand the prescribed list of network interconnection points or increase the number of available unbundled network elements. The Arkansas PSC cannot impose on an incumbent LEC any additional resale obligations or require

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<sup>23</sup> Local Competition First Report and Order, FCC 96-325 at ¶ 53.

<sup>24</sup> Id. at ¶ 66.

<sup>25</sup> Id. at ¶¶ 53, 66.

<sup>26</sup> 47 U.S.C. § 252.

enhanced access to such ancillary services as operator services, directory assistance and listings and 911 functionality. The Arkansas PSC is not free to independently establish cost methodologies following proceedings in which interested parties are allowed to participate. And the Arkansas PSC is highly constrained in the nature and extent of its review of network access/interconnection agreements. As a result, the Arkansas PSC is no longer in a position to "craft a working relationship [with the Commission] that is built on mutual commitment to local service competition . . . or to adopt other critically important rules to promote competition."<sup>27</sup>

The finger prints of incumbent LECs are all over the Arkansas Act. As such, the Arkansas Act is just one more manifestation of a legislative/judicial/regulatory campaign on the part of the incumbent LECs to thwart or delay local exchange/exchange access competition. The Arkansas Act will likely be only the first of a series of legislative enactments designed to protect and preserve incumbent LEC market power and profits. For example, legislation pending in Oklahoma -- *i.e.*, the Telephone Competition, Rural Service and Consumer Protection Act of 1997 -- is clearly designed to strengthen the monopoly position of Southwestern Bell Telephone Company ("SWBT") and other incumbent LECs by prematurely deregulating the provision of monopoly services while guaranteeing a stabilized revenue stream to incumbent providers.

Nor are the incumbent LECs' dilatory stratagems limited to legislative initiatives. On the judicial front, GTE Corp. ("GTE"), for example, has lodged more than a dozen appellate challenges to arbitration decisions issued by individual State commissions.<sup>28</sup> And, GTE is not alone in launching such appeals. Ameritech has recently appealed an Indiana Utility Regulatory

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<sup>27</sup> Local Competition First Report and Order, FCC 96-325 at ¶ 53.

<sup>28</sup> See, *e.g.*, "GTE Files 16th Suit Over Arbitration," Communications Today (January 27, 1997).

Commission arbitration ruling, and SWBT and U S WEST have filed like challenges against, respectively, the Texas Public Utility Commission and the State Commissions of the States of Arizona, Colorado and Minnesota.<sup>29</sup> And of course, one or more incumbent LECs have taken an appeal of virtually every Commission order implementing the local competition provisions of the 1996 Act, including the First Report and Order and the Second Report and Order in CC Docket No. 96-98, the First Report and Order in CC Docket No. 96-149, and the First Memorandum Opinion and Order on Reconsideration in CC Docket No. 95-116.<sup>30</sup>

And on the State regulatory front, the incumbent LECs have been no less active. Thus, the Commission has recently had to head off an effort by U S WEST to induce individual State commissions to collapse all Local Transport and Access Areas ("LATAs") within their respective State boundaries so as to expand the areas Bell Operating Companies ("BOCs") could serve without first obtaining "in-region," interLATA authority from the Commission.<sup>31</sup> Now the Commission is confronted with another effort by U S WEST to assess large surcharges on competitive LECs purportedly to recover costs incurred by incumbent LECs in complying with the local competition requirements of the 1996 Act.<sup>32</sup>

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<sup>29</sup> See, e.g., "Ameritech Challenges Indiana Arbitration Order," Communications Today (April 29, 1997); "U S WEST Sues Colorado Commission," Communications Today (January 29, 1997); "Southwestern Bell Sues Texas PUC," Communications Today (January 23, 1997).

<sup>30</sup> Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. Sept. 5, 1996); Bell Atlantic Telephone Companies, et al. v. FCC, Case No. 96-1333 (D.C. Cir. Sept. 16, 1996); Bell Atlantic Telephone Companies v. FCC, Case No. 97-1067 (D.C. Cir. January 31, 1997); U S WEST, Inc. v. FCC, Case No. 97-9518 (D.C. Cir. April 24, 1997).

<sup>31</sup> Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, NSD-L-97-6, DA 97-767 (April 21, 1997).

<sup>32</sup> Petition for Declaratory Ruling and Contingent Petition for Preemption, filed by Electric Lightwave, Inc., McLeadUSA Telecommunications Services, Inc., and NextLink Communications, L.L.C. in CC Docket No. 97-90, CCB/CPD No. 97-12 on February 20, 1997.



In short, decisive action is required by the Commission to derail the incumbent LEC legislative/judicial/regulatory juggernaut. The Commission has taken decisive action when confronted with the refusal of municipalities to authorize a competitive local exchange provider and when faced with a State's refusal to allow entities other than incumbent and competitive LECs to provide pay telephone service.<sup>33</sup> The Commission likewise acted decisively in turning back U S WEST's attempt to secure backdoor "in-region," interLATA authority by collapsing multiple LATAs into a single LATA.<sup>34</sup> The Commission should act no less decisively here to thwart the Arkansas General Assembly's collateral attack on the pro-competitive Federal telecommunications policy.

### **C. The Requested Relief**

TRA agrees with ACSI that preemptive action by the FCC is not only appropriate, but required in order to address the anti-competitive fall-out of the Arkansas Act. TRA, however, is not entirely comfortable with the specific preemptive relief sought by ACSI. ACSI has urged the Commission to declare that all tasks assigned to the Arkansas PSC by the 1996 Act will hereafter be performed by the Commission. As noted above, Congress and the Commission envisioned a Federal/State partnership in which the Commission would establish uniform national rules and policies and the State commissions would thereafter implement and expand upon these

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<sup>33</sup> Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, 11 FCC Rcd. 13082 (1996), *pet. for rev. docketed* City of Bogue, Kansas and City of Hill City, Kansas v. FCC, Case No. 96-1432 (D.C.Cir. filed Nov. 22, 1996); New England Public Communications Council Petition for Preemption Pursuant to Section 253, CCBPol 96-11, FCC 96-470, ¶ 26 (December 10, 1996), *recon.* FCC 97-143 (April 18, 1997).

<sup>34</sup> Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, NSD-L-97-6, DA 97-767 (April 21, 1997).

national rules and policies. The elegance of this joint jurisdictional approach is that it protects new market entrants while still allowing not only for full consideration of local issues, but full use of the experience and expertise of State regulatory authorities. The Commission has been quick to acknowledge the critically important role to be played by the States in bringing competition to the local exchange/exchange access market:

Our experience in working with state commissions since passage of the 1996 Act confirms that we will achieve . . . [the goal of "creating opportunities for efficient new entry into the local telephone market"] most effectively and quickly by working cooperatively with one another now and in the future as the country's emerging competition policy presents new difficulties and opportunities.<sup>35</sup>

Thus, TRA would urge the Commission to take such preemptive action as shall be necessary to free the Arkansas PSC to perform the tasks envisioned for it by the 1996 Act. This end could be accomplished by preempting Sections 9(d) through (j) to the extent that these statutory provisions constrain the Arkansas PSC from taking actions necessary to facilitate competitive entry into the local exchange/exchange access market and to ensure the availability of competitive offerings for Arkansas residents and business. If the Arkansas PSC, once freed of unlawful statutory constraints, fails to undertake the actions the Congress has directed it to perform, Commission assumption of the Arkansas PSC's role would be appropriate under Section 252(e)(5).<sup>36</sup>

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<sup>35</sup> Local Competition First Report and Order, FCC 96-325 at ¶¶ 42 - 43.

<sup>36</sup> 47 U.S.C. § 252(e)(5). In this regard, it is somewhat disquieting that the Arkansas PSC has ordered a wholesale discount rate of only 14.5 percent. This value was adopted, however, after passage of the Arkansas Act.

TRA further agrees with ACSI that preemption of Sections 5(b) and (d) of the Arkansas Act would also be appropriate. As demonstrated by ACSI, these provisions limit the ability of competitive LECs to obtain State-driven universal service support, in some instances precluding such opportunities altogether. While a State is free to adopt "regulations . . . to preserve and advance universal service," such regulations must not be "inconsistent with the Commission's rules."<sup>37</sup> As ACSI correctly points out, the Arkansas Act violates this requirement in a number of critical respects, precluding a competitive LEC from receiving State-driven universal service support unless it has effectively replicated the incumbent LEC's network, sharply limiting the State-driven universal service support that a competitive LEC that is not entirely facilities-based may receive, and creating "public interest" universal service support thresholds which are not contemplated by the 1996 Act. Effectively reserving State-driven universal service support to incumbent LECs provides such incumbent providers with a clear competitive advantage, erecting in so doing a clear barrier to competitive entry.

Several other elements of the Arkansas Act also give TRA pause. For example, Sections 9(d) and (g) appear to impose restrictions on resale which have been declared unlawful by the Commission. While Section 9(d) commences with the qualifier "[e]xcept to the extent required by the Federal Act," it is not clear whether this condition applies to the second sentence of the provision. The second sentence declares that promotional prices, service packages, trial offerings and temporary discounts need not be made available by an incumbent LEC for resale. While the Commission has afforded incumbent LECs an exception from the otherwise all encompassing resale requirement of the 1996 Act for promotional offerings of up to 90-days

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<sup>37</sup> 47 U.S.C. § 254(f).

duration, it expressly declined to recognize a general exception for promotional or discounted offerings or service packages.<sup>38</sup> Likewise, with very limited exceptions, the Commission declared restrictions on resale "presumptively unreasonable," and did not include among the exceptions "aggregating the usage of multiple customers on resold local exchange services."<sup>39</sup>

Additionally, TRA is concerned that the use of State-driven universal service support to compensate for either decreases in Federal universal service support or revenues lost as a result of Federal regulatory or statutory initiatives, including access charge reform, as contemplated by Section 4(A) and (B) of the Arkansas Act, will unduly tilt the proverbial "playing field" in favor of incumbent providers. Obviously, it is difficult enough for new market entrants to compete with entrenched service providers without providing such incumbents with government-funded revenue guarantees.

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<sup>38</sup> Local Competition First Report and Order, FCC 96-325 at ¶¶ 948 - 53.

<sup>39</sup> Id. at ¶ 939. Moreover, the "net avoided cost" methodology mandated by Section 9(g) of the Arkansas Act stands in direct contradiction to the pricing methodology adopted by the Commission. So too does the embedded cost pricing model required by Section 9(e) of the Arkansas Act.

### **III.**

#### **CONCLUSION**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to issue a declaratory ruling preempting Sections 9(d) through (j) of the Arkansas Act to the extent that they constrain the Arkansas PSC from performing the pro-competitive functions assigned to it by the 1996 Act and Sections 5(b) and (d) of the Arkansas Act to the extent they unduly prefer incumbent LECs.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

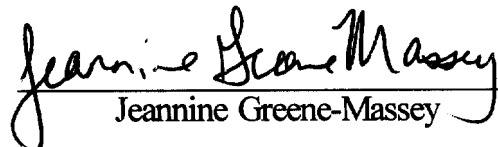
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